No. 89-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D.; JOSEPH DiLALLO, M.D.; PAUL R. FRANZ, D.C.; PHYLLIS LaFLAMME, R.N.; MARY C. MAJOR; and MARY ANN HAMBURGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITIONER'S REPLY MEMORANDUM

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STATEMENT OF THE CASE

"While petitioners undoubtedly feel that the issues are of great concern to themselves, they in no way justify the expenditure of this Court's limited

resources," so asserts Respondent Dr. Oberhand through his attorneys. Oberhand Brief in Opposition, at 14. Perhaps Dr. Oberhand means to suggest that Mrs. O'Grady's injuries are trivial, at least in the great scheme of things, and that Petitioners' perseverance in their search for justice exhibits inappropriate self-absorption. If so, Dr. Oberhand and his attorneys forget that courts exist so that people can have a forum where their grievances can be fairly and justly addressed.

The truth of the matter is that the consequences of Mrs. O'Grady's injuries, judged according to any scheme, are far from trivial, both for herself and her family. As a result of her subarachnoid hemorrhage, Mrs. O'Grady is a mute quadriplegic, confined to the hospital since her collapse on March 31, 1983, fully conscious with complete

intellectual and emotional presence, but able to communicate only through eye movement.

Petitioners contend that Mrs. O'Grady's headache was due to a prodromal bleed. But its origin is irrelevant. The intensity of Mrs. O'Grady's headache was so severe, the pain so terrible, the consequences of the condition which it portended so alarming, that Drs. Oberhand and DiLallo should have referred Mrs. O'Grady to a neurologist. Had they done so, the overwhelming chances are that, whether or not there was a prodromal bleed, Mrs. O'Grady's aneurysm would have been detected and treated by the neurologist before it ruptured, and her injury would have been averted.

Dr. DiLallo says that had he read Dr. Oberhand's letter, describing a headache Dr. DiLallo himself called

"alarming" (19T115-3 to -8; 26T11-12 to -19), and had he then called Mrs. O'Grady, that she would have told him the headache had disappeared. Dr. DiLallo claims he then would not have either asked Mrs. O'Grady to come into the office for an examination or referred her to a specialist. DiLallo Brief in Opposition, at 5. Dr. Oberhand claims he fulfilled his duty to Mrs. O'Grady by just looking at her posture and demeanor, without asking any questions about history. Id. at 3.

Prodromal headaches hurt so much because they are caused by leaking of blood from the aneurysm into the subarachnoid space surrounding the brain, causing a buildup of pressure. As the leaked blood is absorbed by the body over the course of time, pressure is reduced and the pain subsides. The next leak may rupture the aneurysm and

cause very great damage, as in Mrs. O'Grady's case. The fact that a "severe and disabling"[1] headache persists for a long time and then disappears is a bad sign indeed. Dr. DiLallo had a duty to know this. He should not say that the negligence of his servant in misfiling the letter was of no consequence. Dr. Oberhand had a duty to ask Mrs. O'Grady questions about her headache, not just to assume it was like the sinus headaches she had had before.

REASONS FOR GRANTING THE WRIT

I. THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

1. This Court Has Substantially Diminished Its Exemplary Guidance of State Civil Jury Practice, And Is About to

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1. Letter of March 14, 1983 from Dr. Oberhand to Dr. DiLallo -- introduced as plaintiffs' Exhibit 1 at 19T141-2, reprinted in Petitioners' Petition for a Writ, at 17a.

Withdraw Its Hand Completely

Trial by civil jury in our state courts is of importance in preserving the sense that citizens are actors, not just objects, in the process of government. For this reason this Court, has exerted the controlling influence of example over state practice.[2]

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2. In Colgrove v. Battin, 413 U.S. 149 (1973), the Court held juries of six persons proper in federal civil trials. Shortly afterward, the New Jersey State Constitution was amended to allow six person juries in all civil matters. See N.J. Const. of 1844, art. I, para. 7 (1844); N.J. Const. of 1947, art. I, para. 9 (1947); N.J. Const. art. I, para. 9 (as amended Nov. 6, 1973, effective Dec. 4, 1973); see also Rutledge v. Rutledge, 720 S.W.2d 633, 635 (Tex. Ct. App. 1986).

A similar course was followed as to unanimity. American Publishing Co. v. Fisher, 166 U.S. 464, 468 (1897), held the 7th Amendment to require a unanimous jury verdict in federal civil cases. Apodaca v. Oregon, 406 U.S. 404 (1972), held that the 14th Amendment does not require a unanimous jury verdict in state criminal cases, but the 6th Amendment requires a unanimous verdict in a federal prosecution. Many states have conformed their civil jury

In recent years, the number of such examples has diminished. This Court once considered sufficiency of evidence. See, e.g., Wilkerson v. McCarthy, 336 U.S. 53, 55 (1949); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 113 (1963). Today, a petition raising only that issue would have "little or no chance of being granted." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 220 (6th ed. 1986). So too, solicitude for integrity of the jury decisional process (Dairy Queen v. Wood, 369 U.S. 469, 472-73

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practice to Apodaca rather than American Publishing. See, e.g., State v. McKay, 280 Md. 558, 375 A.2d 228 (1977); Phillips v. Meadow Garden Hospital, 139 Ga. App. 541, 228 S.E.2d 714 (1976); Pitcher v. Lakes Amusement Co., 236 N.W.2d 333 (Iowa 1975); Moss v. State, 539 S.W.2d 936, 942 (Tex. Ct. App. 1976) People v. Miller, 121 Mich. App. 691, 329 N.W.2d 460, 461-62 (Ct. App. 1982).

(1962)) has been submerged in the technicalities of administrative estoppel (Parklane Hosiery Co. v. Shore, 439 U.S. 322, 334-36 (1979)).

Now, the guiding hand may well be withdrawn almost altogether; the Chief Justice has recently accepted the report of a distinguished committee recommending abolition of the diversity jurisdiction.[3] This time, it appears that this suggestion may finally be followed; if it is, much of ordinary civil jury litigation will pass from the federal system, and with it will go this Court's ability to use federal exemplars for the edification of state courts.

2. This Court Must Retain Some Means, Short of Incorporation, By Which to Exert Leadership Over Civil Jury Trials

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3. Committee to Study the Federal Courts, Report (1990).

The number and complexity of filings continues to afflict state court systems, the cost of administering the tort system is a deadlocked issue in the general political arena,[4] and state legislatures seek to escape difficult substantive questions by tinkering with the procedural incidents of jury trial.[5]

Even limited incorporation would require case by case line drawing that ought be avoided.[6] What is needed is a doctrinal device which leaves the states

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4. In New Jersey, all but the most highly rated drivers are insured by the Joint Underwriting Association (JUA), which has compiled a deficit approaching $3 billion. The most recently elected governor of New Jersey ran on the campaign slogan "The JUA is D.O.A."

5. Note, Reforming Tort Reform: Is There Substance to the Seventh Amendment?, 38 Cath. U. L. Rev. 737 (1989).

6. Cf., e.g., Pointer v. Texas, 380 U.S. 400 (1965); Green v. California, 399 U.S. 149 (1970).

free to abolish jury trial if they please, but which allows this Court to intervene to ensure that if a state chooses to retain trial by jury in civil matters, that trial will retain basic elements of fairness.

3. This Case of First Impression Can Provide the Means

Petitioners assert that the jurors in this matter, acting in the capacity of sworn (N.J.S.A. 2A:74-6), paid (N.J.S.A. 22A:1-1) officers of New Jersey's judicial branch, violated that oath by deciding the case on facts not in evidence, and so denied Petitioners due process of law under the Fourteenth Amendment. Undergirding that claim are two inferences of fact and two assertions of law.

a. Inferences of fact

Petitioners assert that the five questions asked by the jury on an extraneous subject just before rendering the verdict, taken with the fact that much of Respondent Dr. Oberhand's evidence was irrelevant and the fact that Respondent Dr. DiLallo was exonerated on a ground which he never contested,[7] support the inference that the jury's verdict was based on factors extraneous to the evidence. New Jersey courts have drawn the inference that a verdict is improper based on jury questions. Hacker v. Statman, 105 N.J.

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7. Respondent Dr. DiLallo takes the position here that he is not vicariously responsible for the negligence of his servants because Petitioners took a voluntary nonsuit against them before trial. DiLallo Brief in Opposition, at 19, 21. To the extent this is a claim that a servant is an indispensable party to an action in respondeat against the master, it is simply mistaken.

Super. 385, 392, 252 A.2d 406, 412 (App. Div. 1969). Petitioners ask this Court to find, at least arguendo, that the drawing of this inference is rationally possible.

The Petitioners next ask this Court to find, as a matter of fact, that the four traditional devices employed in New Jersey to prevent, detect and correct jury mistake or misconduct failed to do so in this case. Those devices are: (1) the basic requirement that evidence must be relevant, (2) the requirement that the charge be congruent to the law and the facts in evidence, (3) the rule the special verdicts must be based on grounds in issue at trial, and (4) the rule that the appellate court may make independent inquiry into sufficiency of the facts to support a verdict.

b. Assertions of law

By asking for a finding of fact that the provisions of New Jersey law designed as prophylaxis and cure for jury misconduct failed in this case, Petitioners lay the foundation for their claims of law. These are that they may impute their constitutional injury directly to the jury as state officers and that, absent any reasonable attempt by the state to prevent or correct or ameliorate that injury, remedy may be had in this Court.

c. Limitations on the remedy

The remedy Petitioners seek is an exceedingly narrow one. They would have this Court entertain a claim of constitutionally improper jury misconduct only if (a) all the evidence of such misconduct was clear, (b) the

evidence was also clear that all state safeguards against misconduct had failed, and (c) the state courts had made no good faith attempt to apply those safeguards.

II. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257

1. The Federal Question Was Timely Raised and Fully Articulated Below

a. Supreme Court Rule 14.1(h)

The Respondents complain of failure to conform to the provisions of Supreme Court Rule 14.1(h)[8] in not "making pertinent quotation of specific portions of the record" showing the federal question raised below. The relevant portion of Petitioners' brief in the Superior Court of New Jersey, Appellate

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8. Respondents mistakenly cite Rule 21.1(h). Oberhand Brief in Opposition, at 13; DiLallo Brief in Opposition, at 11.

Division is quoted in the Appendix to this reply.

b. Petitioners may not be denied the writ because they did not raise their constitutional claim in the trial court

In New Jersey practice, a new trial motion must be made within 10 days of the return of the verdict.[9] The constitutional basis for Petitioners' objection to the verdict did not become apparent until after close scrutiny of that transcript, which was not furnished until 11 months after trial. It would be manifestly inappropriate to refuse Petitioners the writ for failure to

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9. A motion for a new trial shall be served not later than 10 days after the court's conclusions are announced in non-jury actions or after the return of the verdict of the jury.

New Jersey Court Rule 4:49-1(b).

raise their federal claim during the 10-day post-verdict period.

2. The Federal Question Was Determined in the Highest Court of the State in Which Judgment Could Be Had

Petitioners seek a writ addressed to the Appellate Division of the Superior Court; their petition for certification from the Supreme Court of New Jersey was denied. Sullivan v. Texas, 207 U.S. 416, 422 (1908); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678 n.1 (1968). Respondents contest this process in an argument which appears to have two branches: The first is that the petition for certification was a hearing on the merits and its denial an adjudication of those merits; the second is that even if the petition was not a full hearing and adjudication, Petitioners nevertheless

failed the standard of Section 1257 because their constitutional claim was not presented to the Supreme Court of New Jersey. The first of these contentions is wrong on the law; the second wrong on the facts. Denial by the New Jersey Supreme Court has precisely the content of denial of a petition for certiorari here: It says nothing about the judgment below.[10] The Petitioners' constitutional contentions

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10. A petition for certification shall be granted on the affirmative vote of 3 or more justices. Upon final determination of a petition for certification, unless the Supreme Court otherwise orders, the clerk shall enter forthwith an order granting or denying the certification in accordance with the Supreme Court's determination and shall mail true copies thereof to the clerk of the court below and to the parties or their attorneys.

New Jersey Court Rule 2:12-10.

were before the Supreme Court of New Jersey; local practice requires that the briefs in the Appellate Division be submitted with the petition for certification.[11] If certification is granted, Petitioners' entire case is before the court.[12]

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11. Within 10 days after filing of the notice of petition for certification, 2 copies of the petition shall be served on each opposing party and 9 copies thereof together with 9 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court.

New Jersey Court Rule 2:12-7(b).

12. If certification is granted, the matter shall be deemed pending on appeal in the Supreme Court and the petitioner's entire case shall be before the Supreme Court for review unless the Supreme Court otherwise orders on its own motion or on the motion of a party which shall be included in the petition or in the respondent's brief in answer thereto.

New Jersey Court Rule 2:12-11.

Respondents then argue that Petitioners waived their federal claim by not taking a direct appeal to that court. The New Jersey Supreme Court so narrowly guards the route of direct appeal that the court itself counsels that it not be taken. "Whenever the right to appeal is not clear, the proposed appellant should petition for certification, setting forth fully the basis of his claim to appeal as of right, together with such other reasons, if any, as he may feel entitle him to a further review." Deerfield Estates, Inc. v. Township of East Brunswick, 60 N.J. 115, 120, 286 A.2d 498, 501 (1972). Petitioners sought certification without simultaneously appealing directly and filed with the New Jersey Supreme Court

an Appellate Division brief containing their constitutional claims. Their petition was rejected, as it would certainly have been rejected if conjoined to a direct appeal. To penalize them for not formally seeking that remedy would exalt form over substance.

Respectfully submitted,

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APPENDIX

Excerpt from Brief of Petitioners in the Superior Court of New Jersey, Appellate Division

D. The Jury's Misconduct Denied Plaintiffs Fundamental Due Process: They Had No Opportunity to Offer Proof on the Issue that Decided their Case.

Because plaintiffs do not here assert plain error, and because the jury's questions here open a rare window into its ratio decidendi, plaintiffs make a claim which they believe to be of first impression: This jury violated their rights to procedural due process under N.J. Const. art. 1, sec. 1, and U.S. Const. amend. XIV. No case has been discovered in which a constitutional grievance has been laid at the feet of jurors themselves, acting as a constituent part of state adjudicatory process. But the fundamental procedural due process right to a fair hearing embraces the right to present evidence, Morgan v. United

States, 304 U.S. 1, 18 (1938), and this jury, by assuming facts instead of deciding them on the proofs before it, and by violating the laws of logic in reasoning from that fact, effectively denied the plaintiffs notice and opportunity to be heard and present evidence. Consequently, damaging and prejudicial materials were deliberated by the jury. United States ex. rel. Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973). The plaintiffs were "entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries." State v. Orecchio, 16 N.J. 125, 129 (1954); State v. Jackson, 43 N.J. 148 (1964); State v. Marchand, 31 N.J. 223 (1959); State v. Zwillman, 112 N.J. Super. 6 (App. Div. 1970). The jury's unconstitutional verdict denied

that right and must be set aside.